

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of ) MM Docket No. 96-70  
 )  
UNDER HIS DIRECTION, INC. )  
 )  
Order to Show Cause Why the )  
License for Station KUHD(AM) )  
Port Neches, Texas Should )  
Not Be Revoked )

To: Honorable Edward Luton  
Administrative Law Judge

RECEIVED  
SEP 16 1996  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF  
UNDER HIS DIRECTION, INC.

Under His Direction, Inc. ("UHD"), pursuant to § 1.263 of the Commission's Rules, submits its Proposed Findings of Fact and Conclusions of Law in the above-captioned proceeding.

I. Preliminary Statement

By Order to Show Cause and Hearing Designation Order, DA 96-466, released April 1, 1996 ("HDO"), the Commission ordered a show cause hearing to determine whether the license for AM Station KUHD, Port Neches, Texas ("KUHD" or "Station") should be revoked. The HDO specified the following issues:

1. To determine whether Under His Direction, Inc. has the capability and intent to expeditiously resume the broadcast operations of KUHD(AM), consistent with the Commission's Rules.
2. To determine whether Under His Direction, Inc. has violated Sections 73.1740 and 73.1750 of the Commission's Rules.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Under His Direction, Inc. is qualified to be and remain the licensee of KUHD(AM).

No. of Copies rec'd  
List ABCDE

224

A pre-hearing conference was held on May 8, 1996, and the hearing took place on July 24, 1996.

## **II. Findings of Fact**

UHD acquired the assets of the Station and the KUHD license from the Church of the Christian Crusade ("CCC") on September 9, 1993. (UHD Ex.1, p.1.) Part of the consideration to CCC from UHD was a promissory note, secured by the assets of the Station, in the amount of \$60,000. (UHD Ex.1, p.1, Attachment D) ("Note".)

Because of financial difficulties, UHD took the Station dark on August 18, 1994. (Tr.71.) UHD filed a request for special temporary authority to remain dark ("STA") on January 6, 1995. (UHD Ex.1, p.1, Attachment A.) UHD's request stated that "KUHD is presently off the air due to extreme financial hardship....We are presently seeking alternative sources of financing and are working with a church organization to possibly help with the monthly support." (UHD Ex.1, Attachment A.) This first request for STA was initially granted by the Commission on February 25, 1995. (UHD Ex.1, p.1.) That grant was superseded by a grant letter dated April 25, 1995 which set an expiration date of July 25, 1995. (Id.)

On February 28, 1995, the assets of the Station located at its tower site, including the Station's tower and transmitter were seized by Janet Chance, the owner of KUHD's tower site. (Tr 72; UHD Ex.1, p.1.) Ms. Chance then purchased those assets herself at a public auction on March 8, 1995. (Tr.72-73; UHD Ex.1, p.1.) UHD continued to have access to the seized assets.

(Tr.72.) UHD also owed back rent to the studio site owner, McKee Towers, but UHD's equipment at the studio site was not the subject of a foreclosure at that time. (Tr.73; UHD Ex.1, p.1.)

UHD was unsuccessful in securing funds on its own to return the station to the air. (UHD Ex.1, p.1.) Shortly after the tower site foreclosure, UHD entered into negotiations with CCC. These negotiations culminated in a Conveyance in Lieu of Foreclosure ("Conveyance Agreement") between UHD and CCC, which was prepared by CCC and CCC's attorney. (Tr.76, UHD Ex.1, p.1.) Mark A. Peterson, president of UHD ("Peterson"), signed the Conveyance Agreement before a Notary Public on May 26, 1995. (UHD Ex.1, Attachment D.) The Conveyance Agreement called for UHD to assign the KUHD license back to CCC in consideration for CCC's forgiveness of the debt owed to it by UHD. (UHD Ex.1, p.1.) CCC also agreed not to pursue any legal action against UHD with respect to the debt owed by UHD to CCC for as long as UHD continued to comply with the terms of the Conveyance Agreement. (Id.) CCC informed UHD that it had negotiated an agreement with Ms. Chance to accept conveyance of the Station assets at the transmitter site in consideration of payment to Ms. Chance of the back rent owed her by UHD. (Id.) CCC also told UHD that it intended to enter into a similar agreement with McKee Towers, the studio site owner. (Id.) With these agreements in place, UHD believed CCC would honor the terms of the Conveyance Agreement and return KUHD to the air. (UHD Ex.1, pp. 1-2.)

UHD filed its first request for extension of STA on July 25,

1995. (UHD Ex.1, Attachment E.) The request enclosed a copy of the agreements between UHD and CCC. (Id.) The request also stated that a transfer of control application should follow within thirty days. (Id.) The FCC granted the extension of STA request on August 2, 1995, for a six month period, to expire February 2, 1996. (UHD Ex. 1, p. 2, Attachment F.)

Once the first extension request was granted, Mr. Peterson called CCC to ask when he could expect to receive the application to assign the KUHD license to CCC. (UHD Ex.1, p.2.) It was UHD's understanding that the assignment application was to be prepared and filed by CCC at its expense. (Tr.31.) During several conversations, J. P. Williams, CCC's business manager, told UHD that CCC was having trouble coming up with the funds and negotiating the terms necessary for it to use the transmitter and other equipment held by Ms. Chance. (Tr.78.) CCC told UHD it did not want to file a license assignment application with the FCC until it had completed its negotiations and was prepared to return KUHD to the air. (UHD Ex.1, p. 2.) It was Mr. Peterson's belief that CCC had the money to complete the transaction, but was probably posturing to get the best deal possible from Ms. Chance and McKee Towers. (Tr.80-81.) Mr. Peterson repeatedly asked CCC when it would go forward with the Conveyance Agreement, but CCC continued to dodge the issue and make excuses. (Tr.79-80.)

During this period UHD did consider canceling or withdrawing from the Conveyance Agreement because of CCC's failure to

proceed. (Tr.78.) However, UHD's legal counsel advised UHD that if it withdrew from the Conveyance Agreement, UHD would be "stuck with \$60,000 debt and lawsuits from everybody involved in the radio station assets." (Tr.78-79.) In fact, Gil and Eloy Castro (who later organized Vision Latina, Inc. ("Vision")) contacted UHD about acquiring the Station, but Mr. Peterson advised them that UHD was obligated under its Conveyance Agreement with CCC and could not enter into any other agreement with anyone else. (UHD Ex. 1, p.2; UHD Ex.2, p.1.)

Approximately one week before the first extension of STA was to expire, on or about January 28, 1996, CCC informed UHD that it was reneging on the Conveyance Agreement. CCC also advised UHD, for the first time, that it had not prepared, and no longer intended to prepare, an assignment application for the KUHD license. In fact, during that conversation UHD learned for the first time that CCC had not even executed the Conveyance Agreement. (UHD Ex.1, p.2.) CCC did not make any mention of its intention to renege on the Conveyance Agreement during UHD's early December phone call with CCC, even though (as UHD later found out) CCC had by early December informed its local attorney who prepared the Conveyance Agreement that it did not intend to go forward. (Tr.82-83.)

UHD's Mr. Peterson immediately contacted the FCC to explain the situation. (UHD Ex.2, p.2; Attachment G.) UHD was forced to make these calls and represent itself before the FCC because it could not afford counsel. (UHD Ex.2, p.2.) After several phone

calls and speaking with several staff persons at the FCC, Mr. Peterson was directed to Mr. Wagner, an attorney at the FCC.

(Tr.31; UHD Ex.2, p.2) After explaining UHD's situation and the fact that its STA would soon expire, Mr. Peterson understood Mr. Wagner to say that any further request for extension of the STA would be granted only if UHD showed the FCC (1) that it had an agreement with a new buyer and (2) that the new buyer would have the right to acquire or lease the KUHD studios and antenna site. (Tr.32, 46; UHD Ex.2, p.2.) Based on this advice, UHD believed that it could not file for a second extension of the STA until after it had secured an agreement with a new buyer. (Id.)

Following his conversation with Mr. Wagner, Mr. Peterson promptly took the steps necessary to satisfy what he understood were the Commission's requirements. First, UHD contacted the Castros on January 31, 1996, and explained that the intended buyer had reneged so that UHD was now free to enter into an agreement with them. (UHD Ex.2, p.1.) UHD also told the Castros that they would have to make suitable arrangements with the owners of the studio and transmitter sites (McKee Towers and Ms. Chance) before they would be allowed to acquire the Station's license. (UHD Ex.1, p.3; UHD Ex.2, p.1.) UHD stated that it would assign the KUHD license to the Castros if they were successful in reaching agreements with those people as required by the Commission. (Id.)

To help insure that the Station's assets would be available to the Castros, UHD asked McKee Towers, the Station's studio site

landlord, to foreclose on the Station assets located on its property, thereby removing the assets from UHD's formal title (i.e., so that CCC would not have the right to obtain those assets via the Conveyance Agreement or by foreclosing on the Note owed by UHD). (Tr.73-74.)

By the end of March 1996, the Castros had incorporated Vision and had negotiated and reached agreements with both McKee Towers and Ms. Chance. (Tr.40-41; UHD Ex.1, p.3; UHD Ex.2, p.1.) Vision had also retained communications counsel to prepare a formal license assignment agreement, which reflected the terms already negotiated by Vision and UHD, and the assignment application. (UHD Ex.1, p.3; UHD Ex.2, p.1.) This work was in progress when the HDO was released on April 1, 1996.

After considering the situation, Vision nevertheless decided to proceed with its efforts to acquire the KUHD license and return the station to the air.<sup>1</sup> (UHD Ex.2, p.2.) Vision therefore authorized its counsel to finalize the assignment agreement between UHD and Vision and to file the assignment application which was executed by both parties. (Id.)

An application for FCC consent to assign the KUHD license from UHD to Vision was filed on May 24, 1996. (Official notice requested, FCC File No. BAL-960524EH) ("Assignment Application").

---

<sup>1</sup> Vision requested that its FCC counsel evaluate the impact of the HDO on the contemplated assignment, a process which was delayed and made more complicated by the MMB's internal differences and the ultimate adoption of a new policy which contradicts the Commission's prior policy. (Tr.11-12; UHD Ex.2, p.2.)

In its application, UHD stated that it had "examined the Station equipment and found it to be in place and in good working order" and that it therefore could return the station to the air within sixty days of grant of the assignment application. (UHD Ex.2, p.2; Assignment Application, Exhibit E.) Pursuant to the Commission's Public Notice on Procedures to Expedite Processing of Silent Broadcast Applications, DA 96-818, released May 22, 1996 ("Public Notice"), UHD and CCC filed a Request for Expedited Consideration of the Assignment Application on June 25, 1996 (UHD Ex.2, p.2; Official notice requested) ("Request"). With the Assignment Application on file, UHD then filed its second request for extension of STA on July 3, 1996. (UHD Ex.1, p.3; Official notice requested.)

UHD and Vision have agreed to enter into a Time Brokerage Agreement. (UHD Ex.1, p.3; UHD Ex.2, p.2.) Such a Time Brokerage Agreement between UHD and Vision would enable UHD to recommence broadcast operations as soon as the FCC finds that UHD should retain its license. (UHD Ex.1, p.3; UHD Ex.2, p.2.)

### III. Conclusions of Law

#### A. Violations of Sections 73.1740 and 73.1750 of the Commission's Rules.

Section 73.1740 of the Commission's Rules deals with stations that must temporarily suspend operations. The rule requires licensees to advise the Commission in writing and to request permission to remain silent. 47 C.F.R. § 73.1740(a)(4).

UHD reported the discontinuance of operation of the Station to the Commission, on January 6, 1995, and received an STA to



remain silent. UHD timely requested its first extension of STA on July 25, 1995. That extension of STA expired on February 5, 1996. Thus, at the time the HDO in this proceeding was issued, the Station had been silent without authorization for only fifty-six days. While indeed a violation of the Commission's Rules, it is not the type of rule violation that rises to a revocation, especially where, as here, the licensee had been in contact with the FCC to determine how best to comply with FCC rules and continued to pursue efforts to return the station to the air. See Blue Ribbon Broadcasting, Inc., 51 RR2d 1474 (Rev. Bd. 1982) (rule violations occurring during times of financial difficulties and over a relatively short period of time and without evidence of misrepresentation or concealment will not result in license revocation.)

UHD never intended to permanently discontinue operations of the Station, so there is no violation of Section 73.1750.

B. UHD Has The Capability and Intends to Return KUHD to the Air Expeditiously.

UHD has acted diligently and been forthcoming with the Commission since taking KUHD off the air. UHD purchased the Station from CCC and executed the Note in favor of CCC in the amount of \$60,000. UHD decided to take the station dark when it ran into financial difficulties. UHD owed back rent to the Station's studio site and transmitter site landlords and also was unable to keep current on its payments under its Note with CCC. UHD reported all of this information to the Commission on January 6, 1995, in its initial request for STA.

During the initial term of UHD's STA, it negotiated and executed the Conveyance Agreement with CCC.<sup>2</sup> UHD's understanding of the terms of the Conveyance Agreement was that CCC would be responsible for and pay for all costs associated with the preparation and filing of an assignment application. CCC told UHD that it would enter into agreements with the Station's studio and transmitter landlords to satisfy the back rent and then return KUHD to the air. As part of the Conveyance Agreement, CCC agreed not to pursue any legal action against UHD on the Note and in fact agreed to forgive the \$60,000 UHD owed CCC under the Note. A copy of the Conveyance Agreement and the Note were sent to the Commission as attachments to UHD's first request for extension of its STA, which it filed on July 25, 1995. It was unforeseeable to UHD that CCC would not promptly prepare and file an assignment application as it had represented to UHD.

During the six month extension term, UHD stayed in contact with CCC, repeatedly asking when the assignment application would be filed and the Station returned to the air. CCC was evasive, and claimed it was having trouble getting money or coming to terms with one of the landlords. UHD believed that CCC was engaging in gamesmanship with the landlords in an attempt to make the best deal for itself, because UHD believed that CCC had

---

<sup>2</sup> UHD executed the Conveyance Agreement and sent its signature page to CCC, believing that the agreement between UHD and CCC was in effect. It was not until CCC told UHD that it was reneging on the Conveyance Agreement in January 1996 that CCC claimed it had never actually executed the Conveyance Agreement.

sufficient funds to consummate the Conveyance Agreement, as it had represented.

In this regard, UHD sought out legal advice to determine if there was any way to get out of the Conveyance Agreement since CCC was not promptly meeting its obligations under the Conveyance Agreement. The attorney advised UHD that cancelling the Conveyance Agreement would give CCC the ability to pursue legal action on the Note. UHD's only recourse was to continue to deal with CCC until CCC either proceeded with the transaction or itself terminated the Conveyance Agreement.

CCC finally advised UHD that it was reneging on the Conveyance Agreement only about one week before the expiration of UHD's first extension of STA. The very next day, January 30, 1996, UHD called the FCC to explain its situation. Based on its discussion with Commission personnel, UHD understood that it should not request a second extension of STA until it had an agreement with a new buyer.

The day after its conversation with the FCC, UHD contacted new prospective purchasers, the Castros, who would later form Vision. UHD monitored Vision's progress, and as soon as Vision had agreements with the tower and studio landlords, UHD prepared to enter into an agreement to assign the KUHD license to Vision. By the end of March 1996, Vision had incorporated, had entered into agreements with the tower and studio landlords and had retained FCC counsel to prepare the license assignment agreement and FCC application for consent to assignment. The parties have

agreed to enter into a time brokerage agreement which would enable UHD to return the Station to the air prior to action on the Assignment Application. UHD thus attempted to maintain the validity of its license, and promptly took the steps it believed were necessary for it to do so, in good faith and after trying to ascertain what the Commission required of it. Without any prior notice to or other communications with UHD, the HDO in this proceeding was issued on April 1, 1996.

It is a result of UHD's diligence that the Station is prepared to return to the air upon a favorable ruling in this proceeding. Unlike the licensees in Hex County Radio, Inc., 44 RR2d 396 (1978) or David R. Price, 71 RR2d 888 (1992), UHD did not ignore communications from the FCC concerning its status.<sup>3</sup> In fact, UHD consistently initiated communications with the FCC, and did its best to comply with the Commission's instructions. Because of its financial condition, UHD decided that the best way to return KUHD, Port Neches' only local radio station, to the air was by assigning the license to a new entity. It has been well established Commission policy to approve assignment of license applications of silent stations so that seller-licensees in financial difficulty may assign the station license to an entity better equipped to operate the station, even where violations of the licensee were far more extensive and egregious than in this case. See, Video Marketing Network, Inc., 10 FCC Rcd 7611 (MMB

---

<sup>3</sup> David R. Price affirmed the ruling of the Review Board (7 FCC Rcd 1838 (Rev. Bd. 1992)), which had affirmed the ALJ's initial decision (6 FCC Rcd 5734 (ALJ 1991)).

1995). In fact, the Public Notice of May 22, 1996 expressly contemplates such assignments.

C. The ALJ Should Expeditiously Hold That  
Revocation is Inappropriate in This Case.

UHD has demonstrated that it has the capability and intent to return the Station to the air by way of a Time Brokerage Agreement and/or assignment of the license of the Station to Vision. These plans are not hypothetical. The license assignment agreement between UHD and Vision was negotiated prior to release of the HDO and is presently on file with the Commission. The application contains Vision's representation that it will return the Station to the air within sixty days of grant of the application. The Assignment Application and the request for expedited consideration of that application have not been addressed by the Mass Media Bureau ("MMB"), which has offered no explanation for the failure to process said application, consistent with its past practice and its May 22, 1996 Public Notice.<sup>4</sup> The parties have also negotiated a time brokerage agreement which, following a favorable Initial Decision, could have the Station returned to the air even sooner.

UHD's sole transgression is its Station's silent status for

---

<sup>4</sup> If the MMB is not processing the Assignment Application because of the pendency of this proceeding, the ALJ should promptly resolve such proceeding in favor of UHD, especially in light of the Section 312(g) of the Communications Act of 1934, as amended. 47 U.S.C. § 312(g). That Section and the Commission's Order Concerning Silent Station Authorizations, FCC 96-218, released May 17, 1996, provide that KUHD must be returned to the air no later than February 9, 1997, or the license will be cancelled as a matter of law.

fifty-six days without authorization. In Mark L. Nalbone, Receiver, 70 RR2d 417, 419 (MMB 1991), the MMB found that remaining off the air without authorization from June 1989 until January 22, 1990 without authorization was

not the type of violation that would result in loss of license. The normal sanction for violations of this type would be a modest monetary forfeiture, but even that sanction would not be imposed against a licensee in financial difficulties.

Nalbone, 70 RR2d at 420.

KUHD is the only broadcast station licensed to Port Neches, Texas, and revocation of that license would rob the community of its only local media outlet. Whatever UHD's transgressions they do not rise to the level of warranting revocation of Port Neches' only voice, especially when plans to return the Station to the air expeditiously are so firmly in place. Indeed, an experienced communications attorney licensee whose station was silent without authorization numerous times and for longer periods of time, was allowed to keep his license. Cavan Communications, 10 FCC Rcd 2873 (ALJ 1995).

D. The Mass Media Bureau Has Not Met Its  
Burden of Proof and Proceeding.

Both the burden of proof and the burden of proceeding are on the MMB, and it has failed to meet its burden. Unlike the revocation of license affirmed in Independent Broadcasting Co. v. FCC, 193 F.2d 900 (D.C. Cir. 1951), the MMB has not demonstrated misrepresentations by UHD to the Commission, nor has it called into question the character of any of UHD's principals. And unlike the licensee in Price, supra, there has been no evidence

of UHD placing the public safety in danger, or ignoring a string of Commission correspondence. 6 FCC Rcd 5734. Even in a case where there were repeated and more numerous technical violations, the license for the station was not revoked. Blue Ribbon, supra. The Review Board listed the licensees numerous violation in that case, then observed:

While the record in this case is clearly not that of an ideal broadcast operation, it is also not one which is so permeated by intentional misconduct and reckless disregard of the law to compel absolute revocation of license authority.

51 RR2d 1474 at 1478. Certainly revocation is inappropriate where the licensee's single transgression is to have been silent without authorization for fifty-six days, and where the licensee has made documented efforts to keep the FCC informed of the status of the station and to learn what the FCC required of the licensee to be in compliance with the rules, and made continuing efforts to comply with these rules as it understood them. This is particularly true where, as in this instance, the licensee acted prior to the release of the HDO.

#### **IV. Ultimate Conclusions**

UHD has demonstrated continued good faith efforts to return KUHD to the air. But for release of the HDO in the middle of its efforts to work with Vision to return the Station to the air, and the MMB's decision not to process the Assignment Application pursuant to its May 22, 1996 Public Notice, it is likely that UHD and Vision would have already returned the Station to the air. UHD can return the Station to the air expeditiously upon a

favorable Initial Decision consistent with FCC rules, cases and policy.<sup>5</sup> A contrary decision would ignore the good faith efforts of UHD and the problems it experienced with respect to CCC that were unforeseeable and beyond UHD's control. It cannot be in the public interest to revoke a community's only broadcast outlet where the licensee's infractions were minor and its repeated efforts to comply were made in good faith -- and while there is a party standing by ready, willing and able to assist in promptly returning the station to the air. Commission policy as well as elemental fairness require no less.

---

<sup>5</sup> UHD expects any Initial Decision to be conditioned upon UHD successfully returning the Station to the air prior to February 9, 1996. See WPVG, Inc., FCC 96D-05, released September 5, 1996.



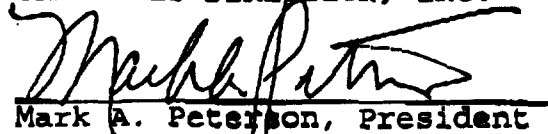
SEP 16 '96 11:29AM BROWN NIETERT&amp;KAUFMAN, CHARTERED

P.2/18

WHEREFORE, it is respectfully requested that the Presiding Judge issue an Initial Decision resolving all issues in favor of Under His Direction, Inc.

Respectfully submitted,  
UNDER HIS DIRECTION, INC.

By:

  
Mark A. Peterson, President

Rt. 6, Box 979K  
Winzer Dr.  
Beaumont, TX 77705  
(409) 721-9394

September 16, 1996

SEP 16 '96 11:29AM BROWN NIETERT&amp;KAUFMAN, CHARTERED

P.3/18

**CERTIFICATE OF SERVICE**

I, Mark Peterson, do hereby certify that I caused a copy of the foregoing "Proposed Findings of Fact and Conclusions of Law of Under His Direction, Inc." to be sent via first class U.S. mail, postage prepaid or hand delivered, this 16th day of September, 1996 to each of the following:

- \* Robert Zauner, Esq.  
Hearing Branch  
Audio Services Division  
Federal Communications Commission  
2025 M Street, Room 7217  
Washington, D.C. 20554
- \* Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 225  
Washington, D.C. 20554

  
Mark Peterson

- \* Hand Delivery